AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 7: The Republican Era—Democratic Rights/Free Speech/Advocacy

**State v. Fox, 71 Wash. 185** (WA 1912)

*Jay Fox edited a small newspaper in Home, Washington, called* The Agitator*. Home was established as a kind of anarchist community. In the summer of 1911, Fox published an article entitled “The Nude and the Prudes.” The article praised Home as “a community of free spirits,” who among other things enjoyed the liberty of bathing “with merely the clothes nature gave them.” But unfortunately, “a few prudes got into the community and proceeded in the brutal, unneighborly way of the outside world to suppress the people’s freedom.” Notably, the “prudes” had acted to have some members of the “Homeites” arrested for indecent exposure, and Fox urged a continued boycott of the “perpetuators of this vile action” until they saw the error of their ways.*

*Washington state law made it a misdemeanor offense for anyone to “willfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, of having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or of any court or court of justice.” Fox was charged under the law and convicted of encouraging indecent exposure. He was sentenced to two months in the county jail. Fox appealed his conviction as unconstitutional, but the state supreme court unanimously upheld the statute and affirmed his conviction. In an opinion written by Oliver Wendell Holmes, the U.S. Supreme Court later affirmed the state court, concluding that writings “encouraging an actual breach of law” were not protected by the First Amendment of the federal Constitution.*

CHIEF JUSTICE MOUNT delivered the opinion of the Court.

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. . . . While the constitutions of the United States and of this state guarantee the right to freely speak, write and publish upon all subjects, it is not meant thereby that persons may with impunity advocate disregard of law; or, as said in People v. Most (NY 1902):

“While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state.”

This is the rule, and the statute under consideration is not repugnant to the constitutional provisions relating to freedom of speech and of the press.

The appellant also argues, and cites numerous cases to the effect, that a statute creating an offense must be certain, and that, where the law is uncertain, there is no law. This is no doubt the rule. We are satisfied it has no application to the statute under consideration. The statute provides: “Every person who shall willfully . . . edit . . . any . . . paper ... or printed matter . . . advocating . . . the commission of any crime . . . or which shall tend to encourage disrespect for law . . . shall be guilty of a gross misdemeanor.” It is argued that the phrase “or which shall tend to encourage disrespect for law” is entirely uncertain. But it has been held that a criminal statute is not void for uncertainty because it denounces acts which “tend,” or are “reasonably calculated,” to bring about prohibited results.

The act here charged is the editing of an article or printed matter tending to encourage disrespect of law or incite the commission of crime. There can be no doubt about the meaning of the article which defendant edited, or that it tended to incite the commission of crime. The article is not a criticism of the law, but was calculated to, and did, incite the violation of law; and there can be no doubt that any reasonable person informed against under the law, as defendant was, would immediately know the exact character of the offense with which he was charged. We think the information and the statute are definite and certain as to the elements of the crime charged. The demurrer was therefore properly overruled.

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Complaint is also made that the court erred in receiving certain evidence to the effect that there were more prosecutions for indecent exposure after the publication of the article than there were before that time. It is claimed that the records of the justice of the peace were the best evidence of that fact, and that such evidence was improper and prejudicial. This evidence was not prejudicial because, when the editing and publication of the article were proved or admitted, it was the duty of the court to instruct the jury, as a matter of law, what the effect of the article was. That was a question of law and not of fact. It clearly upon its face incited the commission of crime and disrespect of law relating to indecent exposure of the person, and whether it did so as a matter of fact was therefore not prejudicial. Any other rule would require proof that an article advocating the commission of crime had actually incited persons to commit a crime, before a conviction could be had for the publication of such articles.

*Affirmed*.